Nos. 9781 and 9782

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILSON BROTHERS AND COMPANY (Wilson Bros. & Co.) (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

ADOLPHUS E. GRAUPNER,
LOUIS JANIN,
Balfour Building, San Francisco,
Counsel for Petitioner.

FILED
JUL 17 1941
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Regulations

Nos. 9781 and 9782

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILSON BROTHERS AND COMPANY (Wilson Bros. & Co.) (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

This brief is in response to the Brief for the Respondent filed in the above-entitled proceedings for review and served on petitioner on July 9, 1941.

A. THE QUESTIONS PRESENTED.

Although respondent has stated the questions in different form than as presented by petitioner (Respondent's Brief pp. 2 and 3) we accept the form and order in which he has presented them and will reply accordingly.

B. RESPONDENT'S STATEMENT OF THE CASE.
(Respondent's Brief, pp. 3-12.)

In making his statement of the case respondent announces that "certain general facts will be stated first, following which particular facts will be discussed as they pertain to each of the issues on appeal." In this feature he follows the error of the Board in its mem-

orandum opinion, of which we complain, by attempting to segregate proven facts and confine them to selected separate issues rather than have all the facts open for consideration where material on all of the issues.

Even while attempting to adopt the scattered findings of the Board, respondent modifies some of their language to benefit his argument. As an instance, the Boards finds: "the petitioner did not reenter the lumber-logging-milling business prior to or during 1932, 1933 and 1934." (R. 56.) Respondent states: "However, prior to 1932 taxpayer had ceased to carry on a logging, milling and shipping business." (Brief p. 7.) This change in language is of considerable assistance to respondent in making his argument to sustain the third question stated in his brief. (p. 2.) It is misleading because petitioner corporation had never engaged in the lumber-logging-milling business, its plans to do so were delayed by the panic of 1929 and the subsequent depression.

As respondent has gone beyond the record in its argument (Brief p. 25) we venture to correct the record as shown by the Board's findings (R. 56) and respondent's statement (Brief p. 7) that: "The taxpayer corporation was preceded by a partnership which had about $1,500,000 invested in its business of logging, lumbering, milling and shipping." Due to faulty reporting in the transcript of evidence, the record fails to show that it was not the immediate predecessor of petitioner that was engaged in such wide spread business with such a large investment but a prior partnership of the same name. It was this older firm that petitioner sought to emulate.

Respondent states that there was no showing of any intent to resume a business of the size carried on by the former partnership, referring to the opinion of the Board only. From the testimony (R. 101, 102) it is clear that the business in mind was at least equal to that of the prior partnership.

Other glaring incidents of enlargement of the effect of the record in attempt to show petitioner liable for surtax are to be found in respondent's statement of the facts. The most reprehensible of these is the statement: "Accounts receivable fom W. Wilson (*presumably W. T. Wilson*) are shown" * * * (Brief p. 10, italics supplied.) There is not one scintilla of evidence to show that W. Wilson and W. T. Wilson were the same person or in any way related, hence the presumption is something unwarranted except for the prosecuting purposes of respondent.

Other discrepancies and misstatements will be pointed out from place to place in the following argument.

C. REPLY ARGUMENT.

I.

THE BOARD ERRED IN SUSTAINING THE COMMISSIONER'S DETERMINATION NOT TO ALLOW CERTAIN DEDUCTIONS CLAIMED BY THE TAXPAYER IN 1934 ON ACCOUNT OF BAD DEBTS ALLEGED TO BE PARTIALLY WORTHLESS.

Under part I of his argument (Brief pp. 16 to 20) respondent consolidates parts I and II of petitioner's argument. (Brief pp. 12-26.) Respondent properly considers the two items covered by his argument as "deductions claimed by the taxpayer in 1934 on account of debts alleged to be partially worthless." How-

ever, he improperly seeks to enlarge the grounds of his defense in order to argue that the Board should be sustained on its denial of such claims.

The respondent having failed by special affirmative allegations in his answer (R. 19) to allege grounds of denial of the claims for deductions made by petitioner is confined to sustaining the Board's action solely upon the grounds for denial thereof found in the deficiency notice. (R. 17.) Petitioner could not be required to do more than submit evidence to overcome the direct reasons expressed by the Commissioner for his denial of the deductions claimed. These reasons were two in number: (1) That no evidence had been submitted to establish the partial worthlessness and (2) no permission had been granted to change from an actual bad debt basis to a reserve basis. As the Board held that "petitioner was on the actual charge-off method of deducting bad debts" (R. 37) the second reason for denial of the claim for deduction has been determined adversely to respondent and requires no further discussion, because it is an issue upon which no error has been assigned.

The task of determining, writing-off and claiming deduction for partially worthless bad debts falls upon the taxpayer and if the surrounding circumstances indicate that the debt is partially worthless and is charged off the amount of the write-off "*shall be allowed* as a deduction in computing net income." (Regulations 86, Art. 23 (k)-1-(2), Petitioner's Opening Brief, p. 16.)

The only point for consideration on the propriety of the deduction is the consideration of the evidence to establish partial worthlessness of the two debts, i. e.

that of Woodhead Lumber Co. of California and that of Kentucky Fuel & Gas Corporation. What evidence the Commissioner had or did not have before him when the deficiency notice for 1934 was prepared we do not know.

Evidence was available to respondent regarding the status of both corporations and it would appear that neither respondent nor his agents performed the duty of checking against such evidence to test the reasonableness of petitioner's claims for deductions. Also, it would appear that respondent had arbitrarily denied the deductions, without effort to ascertain their merit. Furthermore, at the hearing of the proceedings, respondent introduced no evidence to overcome the proofs introduced by petitioner.

Respondent indulges in rather specious statement to bolster his argument to sustain the disallowance of the partial deductions. He seeks to belittle the testimony of W. T. Wilson (Brief p. 19) because he was an interested party, "half owner of the taxpayer corporation". Who would be expected to make an examination, form judgment, and reach a conclusion as to the worthlessness of a debt but someone in close interest to the taxpayer?

Next he misrepresents the amount of security held by petitioner for payment of the indebtedness by stating "The witness admitted that collateral was held consisting of a $25,000 note of another corporation *and* $37,000 face amount of the other corporation's stock". Such a statement leads to the inference that petitioner held collateral amounting to $62,000 or $18,-723.94 in excess of the indebtedness, when such is not the fact. No such admission was made by the witness.

He testified that the note for $25,000 with the stock, which he believed had little value, as collateral for the note had been turned over to petitioner as partial security for the indebtedness. (R. 38. See Petitioner's Opening Brief pp. 18-19.) This left an unsecured indebtedness of $18,276.06 from which the $5,000 was written off. A reading of the record (R. 95) shows that everything essential for the taxpayer to determine the amount of deduction for partial worthlessness had been performed. The finding or determination by the Board of non-deductibility seems to be predicated more upon the fact that petitioner did business with the Woodhead Lumber Co. of Nevada. (R. 38.) The injection or inclusion of this element is gross error, for the deduction was not claimed against the Nevada corporation, which apparently was a solvent corporation with a going business.

With regard to the partial worthlessness of the bonds of the Kentucky Fuel & Gas Corporation respondent defends his action of disallowance on the assertion of what he calls "two patent defects" in petitioner's case. "First, *cost was shown* only by entries upon the taxpayer's books at the end of each year." (Brief p. 20.) If the "cost was shown", as respondent admits, it does not matter whether it was shown in May, June or December. Cost during a specific year was cost of the bonds to petitioner, and that is all the petitioner is required to show. From whom the bonds were purchased, the precise date of purchase, and the other details of purchase are immaterial. "Cost" is the "price paid", although respondent would seem to attempt to create a difference in the meaning. To escape his admission that "cost was shown", respon-

dent seeks to deny the accuracy of the books of account of petitioner. The accuracy and correctness of the cost set up in the books of account was never challenged by respondent during the hearing before the Board, and the differences between the balance sheets in the corporation's income tax return and the books of petitioner did not affect the taxable income of petitioner nor the cost of the bonds. It is interesting to note that the Board accepted petitioner's "cost" as shown by entries on its books of account for all other securities which it owned. (R. 58.)

Respondent next asserts: "Second, the testimony * * * clearly shows that the partial worthlessness claimed *had occurred and was ascertained in a prior year.*" (Brief p. 20.) Such statement is incorrect and not supported by the record cited. (R. 127-128.) It is true that the bonds dropped to a low figure in 1930 and fluctuated at lower prices thereafter, but petitioner had the hopeful right to await a rise or complete collapse in value, and, when neither event happened, to take a write-off for partial worthlessness.

We do not dispute the rules and decisions cited by respondent on pages 16 and 18 of his brief where they are applicable. However, they are not applicable to the conditions of these cases.

We refer to the cases cited in our opening brief (pp. 15-26) as being the applicable authorities for the issues here under argument. In footnote 2 (Brief p. 17) respondent erroneously states and seeks to overcome the rule laid down in *Moock Electric Supply Co. v. Commissioner,* 41 B. T. A. 1209, 1211. (Petitioner's Brief p. 26.) If his contentions are correct, then there could never be a deduction for partial worthlessness

unless the taxpayer had early and definite knowledge of the first trend toward insolvency of a debtor in the first year in which the decline toward insolvency took place. Such contention would nullify the applicable portion of section 23 (k) of the Revenue Act of 1934 and Article 23 (k)-1-(2) of Regulations 86. (Petitioner's Brief p. 16.) The contention conflicts with that portion of Article 23 (k)-1 of Regulations 86 cited by respondent on page 18 of his brief. Before petitioner sought its deductions for partial worthlessness of the two debts it complied with the regulation quoted by respondent. (R. 95, 96.) As the respondent acquiesced to the decision of the Board in *Moock* case (supra) he should not be permitted here to deny the rule which he has accepted.

All that a taxpayer is required to do is to establish a *prima facie* case against respondent on a partially worthless debt, particularly where the grounds stated for disallowances in the deficiency notice are so indefinite and vague as in this case. It has only to show that it has made a reasonable investigation of the facts and drawn a reasonable inference from the information thus obtainable, then the burden of proof passes to respondent. This burden of proof was never undertaken by him.

It must be borne in mind that it is the Commissioner's determination of non-deductibility which is before the Court and that the Board merely affirms the Commissioner. Therefore the closing paragraphs of the opinion in *Clark v. Commissioner,* 85 Fed. (2d) (C. C. A. 3) 622, 625, seem applicable.

> "The taxpayer who knew them" (the circumstances) "at the place and time was in a better

position to make a fair and honest estimate of the value of his security than any one else could possibly be years afterward. The subsequent events show that his estimate was just and reasonable and that the commissioner's is not in accordance with the facts.

"The determination of the commissioner is set aside, the order of re-determination of the Board of Tax Appeals is reversed, and the return of the petitioner reinstated."

II.

THE BOARD IMPROPERLY DETERMINED THAT THE DONEE'S BASIS FOR PROPERTY WHICH WAS THE SUBJECT OF TWO CONSECUTIVE GIFTS WAS THE COST TO THE FIRST DONOR.

This issue is dealt with in Part V-3 (pp. 27-32) of Petitioner's Opening Brief. Respondent is correct in stating that the dispute under this issue has to do solely with 20/100ths interest in the steamship Idaho, which was given by Henry Wilson to Mary H. Wilson, his wife, on February 16, 1917, and transferred by her as a gift to petitioner (which was owned by her two sons) in 1929. The question is what basis to assign to the petitioner as of the date of gift on the 20/100ths interest for purposes of depreciation. (Respondent's Brief p. 21.)

As the second paragraph of respondent's argument on this point seems to be somewhat confusing, we restate it in line with the facts. The transfer by Mary H. Wilson of the 20/100ths interest on January 2, 1929 was a direct gift to the petitioner (R. 93) and, as a gift, was subject to neither gift tax nor income tax. The basis of the value of the gift to petitioner is the

adjusted value to the donor at the time of the gift as determined under section 113 (a) (4) of the Revenue Act of 1928. The provisions of the Revenue Acts of 1932 and 1934 cannot, as respondent seems to argue, affect the depreciable basis of the 20/100ths interest acquired by petitioner in 1929. Such a basis was established at the time of the gift by the Revenue Act then in force and there has been no statutory attempt to provide for a change of such basis. By footnote respondent (Brief p. 22) seeks to obliterate the effect of legislative history recited by petitioner in its opening brief (pp. 29-31). Legislative history is always material in studying the purpose of a development in statutory provisions. We again refer to such history as corroborative of our interpretation of the statute.

If as respondent argues subsection (4) of section 113 (a) is to be ignored as establishing the basis of value of the 20/100ths interest in the steamship "Idaho" in the hands of petitioner on January 2, 1929, and thereafter, why then was that subsection continued in the Act of 1928? Because the gift to Mary H. Wilson was made before January 21, 1921, and on February 6, 1929, she had an unrestricted and continuing vested interest in the property which had an admitted fair market value of 20/100ths of $395,000 on February 6, 1917 (R. 41), the status of that gift was fixed by Section 113 (a) (4) and the basis thereunder was not changed when the property was transferred to petitioner because there is no provision for such change provided by statute. Section 113 provides thirteen methods of ascertaining a basis of value, and excepting where a subsection is restricted or enlarged in effect by reference to other subsection

or section of the Act, each method is independent and self controlling. Subsection (4) does not refer to subsection (2) of section 113, nor *vice versa.*

Respondent seems to be hard driven to sustain his point by speculation of doubtful merit as is demonstrated by his statement (Brief p. 23): "Congress could, if it chose, have taxed the entire amount of a gift to the donee, either when received or when converted into cash." We are not concerned with what Congress might have done but with what it did and what it failed to do. It failed to enact any law which supports respondent's contention on this point.

The cases cited by respondent have no application to the merits of the issue as far as we understand them.

In quoting Section 113 (a) (2) in his argument on page 22, respondent has shown the weakness of his position by deleting the all significant words "the donor or". See petitioner's opening brief pp. 30-32.

III.

THE BOARD'S DETERMINATION THAT TAXPAYER CORPORATION WAS AVAILED OF IN YEARS 1932, 1933 AND 1934 TO AVOID SURTAX UPON ITS SHAREHOLDERS IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, BUT IS CONTRARY TO THE CONCLUSIVE EVIDENCE.

Respondent urges generally (Brief pp. 24-25) that the determination of the Board of Tax Appeals on this issue must be sustained because the similar determination made in the deficiency notice is *prima facie* correct, because petitioner was primarily a holding or investment company, and accumulated earnings and profits beyond its reasonable business needs, either of which is *prima facie* evidence of a purpose to avoid

surtax, but by his silence on this score concedes that there was no direct evidence from which even an inference of a purpose or intent to avoid surtax can be drawn. (*Note.* In the second tabulation on page 25 of respondent's Brief, he has transposed the figures of "Net income exclusive of dividends" for 1933 and 1934. See Brief p. 7.)

Respondent urges that any unfavorable inference to be drawn from the fact that the shareholders' returns were not introduced in evidence must operate against petitioner. (Brief p. 27.) Petitioner cannot accede to this. The returns were in respondent's possession and were not in the possession of or made available to petitioner.

Respondent assumes (Brief pp. 26-27) that under either the 1932 or 1934 Revenue Acts a distribution of $4,000 of petitioner's earnings in 1933 and 1934 to each shareholder would have brought each shareholder within surtax brackets. The record does not disclose what losses the shareholders had to offset this distribution and respondent's assumption is unwarranted except as showing the maximum of possible surtax liability which could have been avoided.

However, *en arguendo,* let us see where respondent's assumptions lead. In the first place respondent's assumptions are incomplete because he does not state and the Board did not find what amount should have been distributed by petitioner to produce dividends. Certainly petitioner would not be required to distribute its entire earnings, particularly in view of its recognized business purpose and its impaired bonds and accounts receivable. Furthermore its actual earnings for tax purposes have not yet been determined, let alone its distributable income.

If petitioner's contentions as to distributable income being reduced by additional depreciation, the impairment of bonds and accounts receivable are correct, as they seem to be, virtually no surtax was avoided. (See petitioner's opening brief pp. 42-43.)

On the other hand, the *maximum* of tax liability, on the basis of respondent's assumptions (Brief p. 27), *assuming all earnings and profits as determined by the Board* to be distributable, was approximately as follows:

	1932	1933	1934
W. T. Wilson	$375.00	$220.00	$1,190.00
F. A. Wilson	none	220.00	1,190.00

Respondent states (on the basis of his assumptions) that some surtax was in fact avoided and urges that the pettiness of the avoidance is conclusive of nothing. This might possibly be true if that fact were the sole evidence in the case, but it is not and directly confirms the positive uncontradicted oral testimony which the Board chose to disregard. Certainly for the purpose of avoidance to exist it must be necessary that something existed which it was desired to avoid. Here that something is at the greatest so inconsequential, particularly to persons of means such as petitioner's shareholders, that the avoidance purpose is inconceivable. Under the law of common sense it is inconceivable that petitioner or its stockholders would deliberately incur the corporation penalty liability for the surtax respondent seeks to impose, when the stockholders' surtax, on respondent's own assumptions, would be so small.

As to petitioner's earnings and profits available for dividends respondent urges (Brief p. 28) that other courts have determined a decline in market values of

stocks as being immaterial. His cited authorities deal with cases in which no business purpose or need for the cash equivalent of the stocks has been shown to exist. Here the business purpose when the time came for its consummation, required an investment in cash of a great deal more than petitioner's securities would bring. The obvious purpose of the frequent contributions of cash to the petitioner and the petitioner's acquisition of stocks therewith was to obtain an enlarged capital in order to fulfill that purpose.

Respondent further urges that it is even more apparent that what petitioner thought with respect to the impairment of its bonds and receivables is immaterial. But when we are dealing with a purpose we are dealing with intent and what the taxpayer thought. If the taxpayer and its shareholders thought its income was nil, as far as intent and purpose is concerned, it was nil.

C. H. Spitzner & Son, Inc., 37 B. T. A. 511, 519-523;

Dill Manufacturing Co., 39 B. T. A. 1023, 1030.

Respondent lists the petitioner's gross sales of lumber on page 28 of his brief. Petitioner accedes that for the business actually conducted no reasonable need existed for any considerable amount of liquid assets, despite the fact that under the efforts of petitioner and its officers lumber sales increased from $28,725.96 in 1932 to $170,239.51 in 1934. This increase is distinctly confirmatory of petitioner's purpose and endeavor to greatly enlarge the scope of its operations as shown by the testimony in the record.

Respondent in effect urges that a contemplated business expansion is not a business purpose and that the testimony of the plan of expansion was somewhat

vague. (Brief pp. 28-29.) Confessedly the time for petitioner's intended expansion could not be fixed in advance, it depended upon the improvement in business conditions in the lumber and shipping industries which were sorely affected by the depression which continued through the years involved. Similarly and because the time of such expansion could not be fixed in advance of such change of circumstances neither could the details of asset acquisition and cost be predetermined. Petitioner's officer-shareholders were not gifted with prescience, they were not astrologers or prophets—they were business men engaged in a business in which they had been engaged since 1906 and which they desired to enlarge as soon as in their judgment enlargement was practical at whatever cost would then be necessary to accomplish the desired enlargement.

The testimony of taxpayer's shareholder was not vague and was of a somewhat general character only because of necessity under the foregoing circumstances. It was direct and to the point and was not even made the subject of cross-examination. Taxpayer's purpose was to engage in the lumber and shipping business to the full extent its stockholders had contemplated when the corporation was organized; to the same extent it had been carried on by a predecessor partnership which had had over $1,500,000 invested therein. This purpose would require expense on reconditioning petitioner's steamers, "laid-up" in the summer of 1929 because during the depression they could not be operated at a profit. Timberlands and mill properties would have to be acquired and expensive logging equipment purchased.

Logging roads would have to be constructed. Costs had increased.

Confirmatory of petitioner's business purpose, found as a fact by the Board (R. 36), was its maintenance of its steamers in substantial repair so that they could easily and quickly be recommissioned at any time. (*N. B.* The findings isolated to determine that issue [II of the Memorandum Opinion, R. 35] were not as firmly restated in determining this issue.) Petitioner was endeavoring to increase its lumber sales and did increase them by 600 per cent in the years involved. Petitioner's shareholders were constantly enlarging petitioner's liquid assets by cash contributions, kept invested in liquid assets so that the desire for expansion could be met whenever the right time came. (See petitioner's opening brief pp. 48-50.)

Respondent states that as a matter of common knowledge a business recovery had occurred prior to 1939. (p. 29.) This was not in the shipping or lumbering business nor applicable to the taxable years under review and certainly was not of the character to warrant the risk at any time prior to 1940 of a million and a half dollars or more in those industries.

Certainly it is true that the weight and credibility to be accorded testimony is a matter for the discretion of the Board. But when that testimony is strongly substantiated by accepted facts, when the facts testified to are the only ones which can be correlated with the accepted facts, it is an abuse of discretion not to follow that testimony. This is particularly true when the stated reason for the refusal is that errors were

made and sworn to on the balance sheets incorporated in petitioner's income tax returns, errors which could result in no possible detriment to anyone, least of all respondent. (See petitioner's opening brief pp. 50-51.)

On page 28 of his brief respondent states: "It is also significant that the business carried on by petitioner made no profit in any of the three years and that the income which was accrued and was accumulated in each year resulted from dividends upon its investments in securities." Is respondent confessing error? The Board determined that petitioner's income for 1933 and 1934, exclusive of dividends was, respectively, $10,908.61 and $13,905.79 (see respondent's brief p. 25) and this despite the fact that extensive depreciation and repairs were held deductible with respect to the steamers, productive of no income. Petitioner reported a gross profit from sales for those years of $8,424.60 and $20,152.56, respectively. (R. 142, 153.)

Respondent has asserted his business judgment as superior to that of petitioner's officers who had been engaged in the lumber business thirty-four years at the date of hearing when he attempts to state (p. 30) what amount of cash and securities would be required by petitioner's business purpose. He *infers* that the expansion was not immediately intended during the years 1932 to 1934 and that implying, in effect, petitioner could have distributed its earnings and the shareholders could have later contributed the distributions back again. But why such circuity when the eventual purpose always existed?

Respondent states that petitioner was rather obviously the incorporated pocketbook of the Wilson family, but does not say how or why. To us it is anything but obvious. In what transactions did petitioner's shareholders deal with it as an incorporated pocketbook? It neither borrowed from or loaned to either of them during any year before the Board.

Respondent speaks of *large* accounts receivable from the two shareholders during the years 1932 to 1934. As to "W. Wilson" he is assuming again. Until the writing of briefs respondent was silent as to the account receivable of "W. Wilson" as being something different from the other accounts receivable shown on petitioner's Exhibit 18. (R. 171-173.) As to F. A. Wilson he is ignoring the fact that the accounts receivable represented the balance on F. A. Wilson's books as a stock broker in favor of petitioner, F. A. Wilson was buying and selling securities for petitioner as its broker, not borrowing money from it. (R. 178.) (See also, petitioner's opening brief pp. 53-56.)

Petitioner submits that the Board committed error in determining this issue against petitioner, and that it should be reversed.

IV.

THE BOARD'S IMPOSITION OF THE NEGLIGENCE PENALTY IS CLEAR ERROR AND CANNOT BE SUSTAINED.

Respondent's argument on this point (Brief p. 31) is so weak as to be a tacit admission that it is without merit or hope. Not a single point of petitioner's argument on this issue (Brief pp. 61-70) has been met or refuted. Respondent states (Brief p. 32):

> "We believe the penalty to be warranted when a deduction is taken, *though its propriety can be neither proved nor disproved* because of carelessly kept records. It is a fair inference from this record that at least some of the deductions disallowed by the Board resulted from carelessness or incomplete bookkeeping or a failure to make a reasonably careful attempt to follow the law and Treasury Rules." (Italics supplied.)

In the deficiency notices respondent asserts the penalty only as "attributable to negligence." (R. 19, 224.) Now he argues nothing about negligence and pleads for a "fair inference" on an unfair ground which has nothing to do with "negligence." Mistakes in seeking deductions are common because of the confusion of the law and respondent here argues that if a taxpayer erroneously seeks a deduction because of uncertainty as to the year or amount for which it should be taken he is to be penalized. Such a position is not one to be commended by this Court.

V.

THE FORM OF THE BOARD'S MEMORANDUM OPINION IS ERRONEOUS.

We quite agree with respondent that the Board is not required to make separate findings of fact and separately state conclusions of law. Nor is any form for a memorandum opinion specified by statute. However, the Board is required to make findings of the facts upon which it basis its opinion.

> *Diller v. Commissioner,* (C. C. A. 9) 91 Fed. (2d) 194, 195.

Furthermore such findings of fact where generally applicable may not be restricted so that their effect is denied to pertinent issues.

Brampton Woolen Co. v. Commissioner, (C. C. A. 1) 45 Fed. 327, 328.

We charge the Board with isolating its findings in some of the issues so as to render them applicable only to such issues when they are momentous to others and, also, in making no findings on other issues excepting by reference to immaterial facts found specifically for another issue. This is certainly error.

As an instance in making its findings on issue V (R. 54) relating solely to the liability of petitioner for surtax for accumulation of surplus no finding is made concerning any negligence of petitioner within the contemplation of section 293 (a) of the Revenue Acts of 1932 and 1934. Yet in determining issue VI (R. 67) the Board's memorandum opinion makes its findings in connection with the discussion of section 104 "applicable with at least equal force" to issue VI. This is not proper finding.

D. CONCLUSION.

It is respectfully submitted that the decision of the Board of Tax Appeals should be reversed to the extent of the errors assigned by petitioner.

Dated, San Francisco,
July 16, 1941.

ADOLPHUS E. GRAUPNER,
LOUIS JANIN,
Counsel for Petitioner.